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CORRELATION OF NORMATIVE RESOLUTIONS WITH NORMATIVE LEGAL ACTS

Keywords: Supreme Court of the Republic of Kazakhstan, normative resolutions, criminal law.

ABSTRACT: In the given article the issues concerning normative resolutions which are given by the Supreme Court of the Republic of Kazakhstan according to criminal cases are pointed out. The structure and mechanism of normative resolutions are discussed. Correlation of normative legal acts are investigated. Normative legal acts consist of legal norms, they regulate and manage social relations. It means that, as the normative legal acts play an important role on the judicial sphere, they create, change the norms and even can stop their activity. Here we may include constitutional laws, codes, laws, all charters of the President of the Republic of Kazakhstan which have legal power. Normative resolutions are equal for all, according to definite cases it is used not for one person, but for several people. Also, normative resolutions are used in accordance with legal acts, and until the used norm loses its power it can have definite power.

According to the 4th article of the Constitution of the Republic of Kazakhstan, Constitution, normative resolutions of the Supreme Court and Constitutional Council are rights which are widely used. These acts which are mentioned above and are shown in the Constitution can be divided into two groups: normative legal acts; normative resolutions.

Normative legal acts consist of legal norms, they regulate and manage social relations. It means that, as the normative legal acts play an important role on the judicial sphere, they create, change the norms and even can stop their activity. Here we may include constitutional laws, codes, laws, all charters of the President of the Republic of Kazakhstan which have legal power.

The issues among normative legal acts are solved by general order. For instance: 1) If there are any contradictions among laws which are accepted by Constitution and Parliament, the norms of Constitution are used. Because, in comparison with another normative legal acts, Constitution has senior legal power; 2) If there are any contradictions among laws, the rules of the law which was finally accepted are used; 3) If there is a contradiction among decisions which were taken by organs whose legal authority is low and normative legal acts, the decisions of those organs whose legal authority is high are used; 4) If there are any contradictions among decisions which were taken by one and the same organ, the rules of the normative legal acts were last received are used; 5) If contradictions are appeared among normative-legal decisions which were taken by one organ, the decisions which were specially taken are used; 6) If there are contradictions among general and special normative-legal decisions which were taken by different organs, the general decisions are used.

Now, if we speak about normative resolutions, in the system of legal acts, its role is not fully defined and founded, it isn't included in the list of normative-legal acts. That is why, during using normative resolutions which were mentioned above, there are some problems in practice from theoretical point of view. According to this, there are quite a lot of debates among scientists about legal authority of normative resolutions in the judicial literature.

The following issues lead to the appearance of the mentioned problems: "Does the official explanation of the Supreme court contain separate legal norms or do they correspond to the part of mentioned legal norms; are the explanations of court organs to the legal norms official and is it possible to acknowledge court explanations as the beginning of law". The mentioned problems arose in 40–50s.

The activities on recognition the initial explanations of USSR Supreme Court plenum as the beginning of criminal law were done¹. Scientists who supported first direction thought that it is wrong to relegate court explanations to the beginning of the law, but some scientists considered this action

¹ А. Градовский, *О судебном толковании законов по русскому праву*, Журнал гражданского и уголовного права 1974, No. 1.

right. Those scientists who support fist direction point out that court explanations supplement the laws, and recognizing them as the beginning of law in our country may have bad influence on the law.

According to Lazarev V.V.: in the native law system “acts which are usually accepted by state organs and officials are key sources of doctrine and laws, that is why they serve as completion of deficiency. And another part of state organs only help to define deficiencies, but they have no right to correct the norms”².

This opinion is right, because all the time the deficiencies in laws are not corrected by creation of rights, they are solved by the usage of special institutions during right using process. The legal system is regulated with the help of the mentioned institutions, and also its profitability and mechanism which is necessary for regulation of the society are formed. As for court, it is temporary system of deficiencies’ correction. Of course, during finding the deficiencies in the process of using law, they cannot fully restore it, they can only make necessary offers to the law executive bodies about accepting new legal norms.

P.E. Nedbailo pointed about it as the following “the explanation which is recognized as a part of legal norms and with the help of which the opportunity to change the content of legal norms is given and during practice it can be harmful for correct implementation of the activities”³. According to N.G. Kadnikov “Or course, court explanation is especially important for using the law. But court explanation cannot be the beginning of law, it can only be a direction for correct explanation of the collected thoughts to the legal norms with the help of the law”⁴.

G.S. Sapargaliyev pointed out that “normative resolutions of the supreme court are not included into normative legal acts. Because, there are no legal norms about appearance, changing and stopping legal relationships in the normative resolutions. But they are included into the legal

² В.В. Лазарев, *Правоположения: понятие, происхождение и роль в механизме юридического воздействия*, Правовыхдение 1976, No. 6.

³ П.Е. Недбайло, *Применение советских правовых норм*, М. 1961. p.355.

⁴ Н.Г. Кадников, *Квалификация преступлений и вопросы судебного толкования: теория и практика. Учебное пособие*, М. Норма 2003, p.74.

system”⁵. S.S. Alekseyev⁶, N.V. Mihakeva⁷, L.V. Smirnov⁸ consider that according to the law and according to the defining property the explanations of Supreme Court Plenum can be included into normative acts.

According to M.Suleimenov, right (law) is system of legal norms which is defined and approved by the state and which regulate social relations and provide the opportunities of state coercion (rights are same for all people)⁹. According to his opinion court practice cannot be recognized as the beginning of the right (law). Because, the beginning of the law is concrete meaning, the decisions which were taken there must be concrete and full.

We considered right to to use the full opinion M.T. Alimbekov who is the head of the Supreme Court of the Republic of Kazakhstan about content and importance of court resolutions. He confirmed that the main law of our country is Constitution of the Republic of Kazakhstan, laws which correspond to the constitution, ratified international terms and resolutions of the Constitutional Council and Supreme Court. According to this, those who make the law through confirming this constitutional rule, as normative resolution is a part of the law used in the republic, set some legal norms. If we consider this from logical point of view different beginnings of law can be the forms of legal norms: normative legal acts, court precedent, terms with normative content, standards of jurisprudence and etc. Normative resolution of the Supreme Court can be the beginning of the law.

⁵ G.S. Sapargaliyev, *Normative resolutions of the Supreme Court as the source of functioning law in the Republic of Kazakhstan*, The courts and their role in strengthening of state independence: Proceedings of the international scientific-practical conference dedicated to the 10th anniversary of the independence of the Republic of Kazakhstan, Astana, 15–16 March 2001. Astana, the Supreme Court of the Republic of Kazakhstan, 2001. pp. 62–67.

⁶ С.С. Алексеев, *Общая теория права: Т. 1*. pp. 354–355.

⁷ Н.В. Михалева, *Судебная практика судов общей юрисдикции как источник права, Судебная практика как источник права*, Отв. Ред. Серии Б.Н. Топорнин. М. 2000, p. 138.

⁸ Л.В. Смирнов, *Деятельность судов Российской Федерации как источник права*, Журнал российского права. 2001, No. 3. p. 51.

⁹ М.К. Сулейменов, *Нормативные постановления Верховного Суда в системе источников права*, Зангер No 1, январь 2010.

We think that the results of interpretation works consist of: general duty, continuation of the activity, versatility of usage; if we take into consideration all the properties of normative resolutions as wide spreading of subjects, such acts which are considered as a collection of interpretational norms can be called normative interpretational acts. Normative resolutions have the power of regulation.

According to constitutional rule, the following question can appear: can law producing role of court be conformed to the theory of power dividing? I can answer as the following. Yes, the issues of legal work of court, indeed, are very complicated. On one hand, the function of legal work of court cannot be conformed to the rules of power dividing. On the other hand, the importance of power dividing role does not separate one branch of power from another, that is it has an absolute form. And, vice versa, their functions are mixed, special organizational-legal activities are made in many countries. They supply not only their limits; they give an opportunity for all branches of power to communicate with each other on a definite level. With the help of this mutual relation, speaking definitely with a help of court power the opportunity to improve and develop the law is appeared.

The Supreme Court shows in normative resolutions its legal directions as legal conclusion and offer of courts, so they actively take part in the process of making law, form positive right and have influence on improving and developing laws which are used. According to M. Alimbekov in the process of using legal norms through court when it is necessary to learn different explanations and terms court practice plays an important role. Speaking definitely, only the high bodies of court power are of great importance and can fully understand the content of normative acts during analysis of such explanations. Some legislation consist of many terms. For example, civil legislation contain nonsystematic terms of evaluation which have quantitative and qualitative forms (any limitation, continued interval, violation of law), or some terms which do not have concrete legislative rule (tradition, civil decline, household agreement). The mentioned special role of the Supreme Court of the Republic of Kazakhstan takes all such deficiencies in one system.

Nowadays there is no subject who can give official explanation to the law from judicial point of view. And we can surely say that taking into

consideration the forms of normative resolution which are directed to interpretation, specification and allocation, the Supreme Court of the Republic of Kazakhstan fully amend all deficiencies.

Taking into consideration the importance of right building form of normative resolutions, today we must do our best in order to increase the quality of an official document which is mentioned above. Firstly, taking into consideration new requirements which are put to their object and content it is necessary to regularize the order of forming normative resolutions' content. Secondly, it is necessary to discuss normative resolutions and form the concrete order of the beginning of their acceptance. All these mentioned above give an opportunity to systematize law technics of law forming act of the Supreme Court of the Republic of Kazakhstan and form the concrete order of making the normative resolutions.

If the court acts of the Supreme Court according to definite case were accepted after discussion of legal directions and legal rule, other courts if they have the same cases would come to the same decision, this gives an opportunity for court practice in the republic to be held identically¹⁰.

According to Zh.N. Baishev the Supreme Court has no right to accept normative resolutions which have contradictions with constitution and laws, but it has the right and must give explanation to other courts about how to use the legislation which have such contradictions and also if there is some deficiency in law, on the basis of court practice, rules of law and analysis of system. In the result of analyzing cases of one definite category smooth decisions are appeared, definite variants and some law notions and terms are formed¹¹.

“The norm of Constitution which give the right to the Supreme Court to accept normative resolutions, indeed, legitimize the right of the Supreme Court to give an official explanation to the law norms which demand additional explanation even if they correspond to the Constitution under

¹⁰ M. Alimbekov, *Normative resolutions of the Supreme Court as the official acts of judicial law-making*, “Zanger” 2010, No. 1, pp. 4–7.

¹¹ Zh.N. Baishev, *The place and role of the normative resolutions in the system of normative legal acts and functioning law*, Proceedings of the international scientific-practical conference, 2009, p. 23.

the privilege of fair court of the republic” – says doctor of legal sciences, professor Z.Zh. Kenzhaliyev¹².

According to I.Zh. Bahtybayev and G. Sapargaliyev normative resolutions of the Supreme Court and Constitutional Council have no property of normative legal act, ...they are accepted as acts which have normative property. ...they are structural part of the right, they form right in its power and develop it. In this way I.Zh. Bahtybayev specifies the sources right while using the normative resolution of the Supreme Court¹³.

In his explanation of the Criminal code of the Republic of Kazakhstan I.Sh. Borchashvilly pays great attention to the normative resolutions of the Supreme Court and according to his opinion those resolutions work together with discussed norms, their rules are compulsory for all users of the law who take part in the court of criminal case, that is bodies of reference service, examining magistrates, public prosecutors, advocates, judges¹⁴. The Supreme Court practise the use of constitutional norms by other courts and give necessary explanations according to it: – points K.A. Mami¹⁵.

But in Russian literature the resolutions of high instance court plenums are normative acts¹⁶. If we take all this from second side, of course, when we consider the contents of explanatory acts separately from content of explanatory legal norms, according to their self-sufficiency and form they

¹² Z.Zh. Kenzhaliyev, *Constitutional and legal nature of the judiciary and the rule-making of the Supreme Court of the Republic of Kazakhstan*, Proceedings of the international scientific-practical conference, 2009, pp. 60–61.

¹³ I.Zh. Bahtybayev, *The problems of applying the regulatory decisions of the Supreme Court of the Republic of Kazakhstan in the activities of the operative – investigative and control functions*. Proceedings of the international scientific-practical conference, 2009, p. 124.

¹⁴ I.Sh. Borchashvilly, *The problems of applying the regulatory decisions of the Supreme Court of the Republic of Kazakhstan in the activities of the operative-investigative and control functions*. Proceedings of the international scientific-practical conference, 2009, p. 127.

¹⁵ K.A. Mami, Zh. Baishev, *About legal nature of the normative resolutions of the Supreme Court of the Republic of Kazakhstan*, “Jurist” 2004, No. 5, pp.20, 70–75.

¹⁶ А.Ф. Черданцев, *Толкование права и приговора*, М. Юнити, 2003. А.Ф. Черданцев, *Толкование права и приговора*, М. Юнити, 2003.

can be recognized as beginning of law. But, it is considered to be contradictory to the normative legal acts and to the theory of law explanation. Because, the acts of official explanation cannot be used without separate explanations of law norms. And also, they cover only limitation of norm explanation, if the mentioned norm is finished, the explanation becomes invalid. G.Ya. Stoyakin agrees with the given point of view¹⁷.

We think that, court acts are of legislative form. Courts, during consideration of definite cases can separately decide what norms to use. Sometimes, courts can give explanations to the law norms, and as it is considered from one side, some contradictions may appear. In those cases the issues of recovering such contradictions are described in constitutional aspect. To regulate this problem is the competence of Constitutional Council of the Republic of Kazakhstan. The constitutional Council paying attention to the normative acts understudy and their use in law practice evaluate their role in the system of legal acts and supply the finding of constitutional meaning of the used law. Then, decided issues are embedded through additions to the laws of the Republic of Kazakhstan. That is why, giving explanation is one of the ways to achieve necessary results in implementing norms of law.

There are some questions in the judicial literature concerning official or non official characters of explanations which were given to the law through Sureme Court. About this, according to the Constitution of the Republic of Kazakhstan, giving of explanation is carried out by Constitutional Council and Supreme court. In the Constitution of the Republic of Kazakhstan giving explanation for direct laws is not pointed, only giving of some official explanations in oblique way is pointed. In order to be sure in it we may look at Constitution and normative legal acts of the Republic of Kazakhstan.

According to the 4-article of Constitution the Supreme Court of the Republic of Kazakhstan produces normative resolution. And according to the 81-article of Constitution The Supreme Court of the Republic of Kazakhstan shall be the highest judicial body for civil, criminal and other

¹⁷ G.Ya. Stoyankin, *The role of court practice in forming civil legal relationship*, "Practice. Comments. Survey. Informational magazine" 2005 (internet version), Vol. 24, No. 4.

cases which are under local and other courts, exercises the supervision over their activities in the forms of juridical procedure stipulated by law, and provide interpretation on the issues of judicial practice.

Not only courts but other bodies must use the normative resolutions of the Supreme Court of the Republic of Kazakhstan. Here we mean state and non-state organizations, enterprises and institutions, social organizations and citizens. In the territory of the Republic of Kazakhstan the Supreme Court must do everything in order to keep the law and use it correctly. That is why resolutions of the Supreme Court cannot be considered as non-official. In practice normative resolutions of the Supreme Court of the Republic of Kazakhstan are significant legal acts which are of great importance in the way of keeping the law and its correct execution.

And, normative resolution of the Supreme Court of the Republic of Kazakhstan is the object of implementation of interpretations of the Supreme Court. It means that, the Supreme Court investigates court practice according to legal procedures and materials of procedure, and according to their conclusion the Supreme Court manages the issues of keeping the law by other Republican courts during administration of justice. While following the law they give explanations according to questions appeared, if any. According to the collected results, the Supreme Court shows its interpretations in the form of normative resolution. In the 4-article of the Constitution of the Republic of Kazakhstan it is pointed that the provisions of the Constitution, the laws corresponding to it, other regulatory legal acts, international treaty and other commitments of the Republic as well as regulatory resolutions of Constitutional Council and the Supreme Court of the Republic shall be the functioning law in the Republic of Kazakhstan.

The Supreme Court of the Republic of Kazakhstan produces normative resolutions by taking on court practice. During the process of producing the mentioned resolutions it is guided by such reasons as “there is no unity during understanding and using of laws”, “mistakes during using material laws”, “some questions which need explanations appeared during use of legislations” and etc. According to it the Supreme Court of the Republic of Kazakhstan through other bodies of court evaluates the use of laws and gives explanations. And if they evaluate the law, it will be considered the

process of legal creative work. The basis of the beginning of explanation of the Supreme Court is its content. There the ways of using mentioned law, the ways of understanding terms and ways analyzing the pointed events are shown.

Normative resolutions are equal for all, according to definite cases it is used not for one person, but for several people. Also, normative resolutions are used in accordance with legal acts, and until the used norm loses its power it can have definite power. According to the law "About normative legal acts" which was passed on 24 of March in 1998, normative resolutions of the Supreme Court of the Republic of Kazakhstan are main normative acts (3-article, 2 part). The Constitutional Council of the Republic of Kazakhstan in its decision №3 from 6 of march, 1997 pointed that the decisions of the Supreme Court about accepting normative resolutions must be accomplished without any argument. The reason for this was address of President of the Republic of Kazakhstan to Constitutional Council from 10 of February, 1997. ОҒАН КАЗАҚСТАН. And in its decision the Constitutional Council pointed that the normativity is explanation which was given according to the characters of subjects during the court process and those explanations which were given in accordance with issues of using legislations of the Supreme Court. And such normative resolutions are compulsory for all courts in the republic, and it is given in accordance with issues of using legislative norms in the court practice and in accordance with the Constitution of the Republic of Kazakhstan¹⁸.

That is why, Constitution, and on the basis of it and its law in decisions of constitutional council the Supreme Court takes an opportunity to accept normative resolutions, but these rights are limited in the circle of "issues of using legislative norms in the court practice", – formulates L Chanturiya¹⁹. Professor R. Knipper asserts that in The Federal Republic of Germany the Supreme Court has no authority to accept normative

¹⁸ L. Chanturiya, *About the legal nature of the judicial acts within the judicial and law-making*, "Zanger" 2010, No. 1.

¹⁹ R. Knipper, *The interpretation, analogy and the development of the court and legislative powers*, "Zanger" 2010, No. 1.

resolution, and deficiencies of norm of law are improved by discussing the problem during court process²⁰.

As it is shown in the 78-article of Constitution: “The courts shall have no right to apply laws and other regulatory legal acts infringing on the rights and liberties of an individual and a citizen established by the Constitution. If a court finds that a law or other regulatory legal act subject to application infringes on the rights and liberties of an individual and a citizen it shall suspend legal proceedings and address the Constitutional Council with a proposal to declare that law unconstitutional”. The normative resolutions of the Supreme Court of the Republic of Kazakhstan can appeal with such offer to Constitutional Council at any period of legal process. Here, all courts can strictly keep the object and content of appealing to Constitutional Council which is pointed in 22-article of Constitutional law “About Constitutional Council of the Republic of Kazakhstan” from 29 of December, 1995. Normative resolutions of the Supreme Court of Kazakhstan are functioning rights as normative acts. The positions of normative resolutions are formed through comprehension of court practice. The content of resolutions consists of law reports. And normative status of resolutions high branch of judicial authority is based on general sitting of the Supreme Court.

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²⁰ Resolution of Board on criminal case of Armed Forces of the Republic of Kazakhstan, 19.02.03, No. 2H-25-03.

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